IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 09-0624

WILLIAM RONALD HENDERSON,

Petitioner and Appellant,

v.

STATE OF MONTANA,

Respondent and Appellee.

ANDERS BRIEF

On Appeal from the Montana Eleventh Judicial District Court,
Flathead County, The Honorable Katherine R. Curtis, Presiding

APPEARANCES:

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INTRODUCTION

On December 9, 2009, this Court appointed the Office of the Appellate Defender (OAD) to represent William Ronald Henderson (Henderson) in filing a request for an out-of-time appeal from the Eleventh Judicial District Court's denial of Henderson's petitions for postconviction relief and related orders. It is undersigned counsel's understanding that Henderson does not presently wish counsel to file a request for an out-of-time appeal from these postconviction proceedings. As the filing of such a request is the express purpose for which this Court appointed OAD and as counsel is unable to identify any other non-frivolous appeals, counsel moves this Court to allow undersigned counsel and OAD to withdraw from representing Henderson in accordance with *Anders v. California*, 386 U.S. 738 (1967), and Mont. Code Ann. § 46-8-103(2). Henderson has also previously expressed concerns that undersigned counsel has an actual conflict of interest in this matter but has never filed a motion requesting the disqualification and replacement of undersigned counsel.

Pursuant to Mont. Code Ann. § 46-8-103, counsel has previously advised Henderson of counsel's decision regarding the merits of this appeal and informed Henderson that he will have the right to file a response to this motion directly with the Court.

ISSUE

Should the undersigned counsel and OAD be permitted to withdraw from representing Henderson in accord with the criteria established by the United States Supreme Court in *Anders*?

STATEMENT OF THE FACTS AND CASE

Henderson was convicted of attempted deliberate homicide following a jury trial in the Eleventh Judicial District Court. Henderson's direct appeal from this conviction was decided by this Court on October 9, 2003, in *State v. Henderson*, 2003 MT 285, 318 Mont. 31, 78 P.3d 848. Henderson was represented at trial by David Stufft and during direct appeal by Glen Neier (Neier). Henderson's sole claim on direct appeal was that his trial counsel provided ineffective assistance by not calling Henderson as a trial witness even though counsel had promised the jurors during his opening statement that they would hear from Henderson during the trial. *Henderson*, ¶ 2. In analyzing whether this ineffective assistance claim was appropriate for review on direct appeal, this Court stated:

> We have recently addressed two ineffective assistance of counsel cases in *Herrman*, and in *State v. Turnsplenty*, 2003 MT 159, 316 Mont. 275, 70 P.3d 1234. Both cases involved claims that counsel improperly exercised their challenges for cause and their peremptory challenges.
>
> In addressing Herrman's claims, we noted that it was a mistake for us to "assume," as we did in *State v. Chastain* (1997), 285 Mont. 61, 947 P.2d 57, that we could "determine from a cold record whether there was a tactical reason for not exercising a challenge [for cause]." *Herrman*, ¶30. Consequently, we overruled Chastain on that basis.

Hermann, ¶33. We held in *Hermann*, that the reasons for counsel's actions "should be the subject of a postconviction evidentiary inquiry." *Herrman*, ¶30. Further, we held that we could not conclude whether counsel had a strategic plan for exercising a peremptory challenge, rather than a challenge for cause, without the benefit of a postconviction hearing. *Herrman*, ¶32.

Similarly, in *Turnsplenty*, we relied on *Herrman* in holding that we could not address Turnsplenty's claim of ineffective assistance of counsel without considering matters outside the record. *Turnsplenty*, ¶18. Hence, we dismissed his claim, as it was not record based and would be more appropriately raised within a postconviction relief proceeding. *Turnsplenty*, ¶¶18, 21.

Here, Henderson's claim does not involve a challenge for cause or a peremptory challenge, as in *Herrman* and *Turnsplenty*. However, Henderson's argument still raises the question why [defense counsel] took the particular course of action he did, namely in not calling Henderson as a witness after stating to the jury that his client would testify. We decline to speculate on why defense counsel did not call his client to testify in view of his opening statements. As we explained in *State v. Harris*, 2001 MT 231, 306 Mont. 525, 36 P.3d 372, if the record does not disclose fully why counsel took a particular action, then "the matter is best-suited for postconviction proceedings which permit a further inquiry into whether the particular representation was ineffective." *Harris*, ¶21. Whether [defense counsel] had a tactical or strategic reason for not calling his client to testify, given his opening statements, is best explored in an evidentiary hearing in a postconviction proceeding.

We hold that Henderson's claim of ineffective assistance of counsel is not sufficiently record-based, and, accordingly, we dismiss this appeal.

Henderson, ¶¶ 15-19. The Court concluded its opinion with the statement:

"Dismissed." *Henderson*, ¶ 20.

On January 7, 2005, Neier filed a Petition for Postconviction Relief upon Henderson's behalf. (D.C. Doc. 3.)[1] The Petition was timely under Mont. Code Ann. § 46-21-102(1), having been filed within one year of the 90 day expiration of time for petitioning the United States Supreme Court for review of this Court's October 9, 2003, *Henderson* decision under U.S. Sup. Ct. R. 13.1. Neier also filed what he entitled a "'*Anders*' Memorandum in Support of Petition for Postconviction Relief." (D.C. Doc. 4.) The district court ordered the State to respond to the Petition (D.C. Doc. 5) and on May 20, 2005, denied both Neier's motion to withdraw and Henderson's request for appointment of new counsel (D.C. Doc. 18 (attached as Ex. C)). The State responded to the merits of Henderson's petition for post-conviction relief on June 27, 2005. (D.C. Doc. 21.) In October of 2005, Henderson filed a *pro se* petition for supervisory control with this Court raising his ineffective assistance concerns regarding Neier. This Court denied the petition, noting that postconviction relief was the appropriate vehicle for raising such ineffective assistance claims. *Henderson v. State*, No. 05-626. In March of 2006, Neier sought leave to file an amended petition for postconviction

[1] Neier filed the petition using the original criminal case's DC-00-197(B) cause number. The district court subsequently entered the petition under a new civil cause number: DV-05-63(B). Given the procedural posture of this case, the district court record has, to counsel's knowledge, not yet been transmitted to the Clerk of the Supreme Court. A copy of the docket sheet for DV-05-63(B) is, thus, attached as Ex. A. The Petition for Postconviction Relief itself (showing what appears to be the clerk's initial January 7 file stamp) is attached as Ex. B.

relief. (D.C. Docs. 26-27.) The district court granted leave to amend on July 5, 2006, and accepted filing of an amended petition. (D.C. Docs. 31-32.) In September of 2008, Henderson wrote a *pro se* letter to the district court seeking the status of his postconviction case. (D.C. Doc. 33.) Seemingly prompted by this letter, the district court issued an order requiring a response to the amended petition from the State. (D.C. Doc. 35.) The State filed a one-page response on October 31, 2008. (D.C. Doc. 36.)

On November 17, 2008, Henderson filed a *pro se* motion requesting copies of the court file and appointment of new counsel on the basis that Neier was refusing to communicate with Henderson. (D.C. Doc. 37.) Some seven months later on June 9, 2009, the district court denied these requests by written order. (D.C. Doc. 39.) On July 16, 2009, the district court signed an order denying the petition and amended petition for postconviction relief. (D.C. Doc. 40.[2]) The district court docket sheet lists the order as being entered on July 22, 2009.

In a letter dated July 29, 2009, Neier conveyed the district court's denial order to Henderson and informed him:

> As you will see the Judge denied our request for relief and determined that no hearing is required.

[2] Although the district court's docket sheet describes this order as "Order & rationale on petition for postconviction relief: granted," the "granted" description would seem to be a typo by the clerk. The full Order is attached as Ex. D.

> I intent seek withdrawal as counsel from the case. After filing an Anders Brief, I do not think it appropriate to continue to pursue an appeal.
>
> You have sixty (60) days to file an appeal with the Montana Supreme Court.

(Attached as Ex. E.) It was Henderson's understanding from this letter that Neier was unwilling to file a notice of appeal on Henderson's behalf. Henderson, thus, attempted *pro se* to initiate his appeal from the district court's postconviction relief denial order. At the time, Henderson was incarcerated at the Stafford Creek Corrections Center in Aberdeen, Washington.

On September 14, 2009, Henderson--relying on an out-of-date 2005 copy of the Montana Rules of Appellate Procedure--filed a *pro se* Notice of Appeal with the district court. The district court's clerk refused this document and returned it to Henderson for failing to certify service to the State and because the Rules now require appeals to be initiated by filing a notice of appeal with this Court's clerk. Henderson resubmitted the Notice of Appeal to the district court with a Certificate of Mailing to the Montana Attorney General, the Flathead County Prosecuting Attorney's Office, and the Clerk of the Montana Supreme Court. (D.C. Doc. 41.) The district court clerk accepted this resubmitted Notice of Appeal into the district court record on October 13, 2009. (D.C. Doc. 41.)

On October 16, 2009, the Clerk of the Supreme Court returned to Henderson the copy of the district court Notice of Appeal that Henderson had sent to this

Court. Henderson then filed a *pro se* Amended Notice of the Appeal with this Court. This document was accepted and filed by the Clerk of the Supreme Court on November 13, 2009. On December 9, 2009, the Supreme Court issued an Order concluding that the Amended Notice of Appeal filed by Henderson with this Court did not meet the requirements for seeking an out-of-time appeal under Mont. R. App. P. 4(6). The Court ordered that "the Office of Appellate Defender (OAD) is appointed to review this matter and to represent Henderson in filing a request for an out-of-time appeal that complies with M.R. App. P. 4(6), and any other claims OAD deems necessary and appropriate." The Court also observed, "The Court records and Henderson's contentions raise questions as to whether Henderson received ineffective assistance of counsel, and whether he was entitled to appointment of counsel to prepare a petition for post-conviction relief based upon our suggestion in *Henderson*."

ARGUMENT

I. UNDERSIGNED COUNSEL AND OAD SHOULD BE PERMITTED TO WITHDRAW FROM HENDERSON'S APPEAL IN ACCORD WITH *ANDERS*.

In *Anders*, the United States Supreme Court concluded that when counsel on appeal finds the case to be wholly frivolous after a conscientious examination, counsel should advise the court and move to withdraw. *Anders*, 386 U.S. at 744; *see also,* Mont. Code Ann. § 46-8-103(2). The request to withdraw must be

"accompanied by a brief referring to anything in the record that might arguably support the appeal." *Anders*, 386 U.S. at 744; *see also*, Mont. Code Ann. § 46-8-103(2). This brief addresses those potential matters.

In the realm of appellate criminal defense practice, a dilemma arises between counsel's duty of diligence to his client and the duty of candor before the court. The United States Supreme Court addressed this dilemma as follows:

> We interpret the discussion rule [of *Anders*] to require a statement of reasons why the appeal lacks merit which might include, for example, a brief summary of any case or statutory authority which appears to support the attorney's conclusions, or a synopsis of those facts in the record which might compel reaching that same result. We do not contemplate the discussion rule to require an attorney to engage in a protracted argument in favor of the conclusion reached; rather, we view the rule as an attempt to provide the court with 'notice' that there are facts on record or cases or statutes on point which would seem to compel a conclusion of no merit.

McCoy v. Court of Appeals of Wisconsin, District 1, 486 U.S. 429, 440 (1988). Thus, the appellate defender must dutifully report to the Court that no merit exists in the appeal, but cannot "engage in a protracted argument" against his client's position.

Here, undersigned counsel is compelled by his duty of candor before the Court in accord with *Anders* to provide this Court with notice that review of the entire record and diligent research has revealed that there are no non-frivolous issues present that Henderson wishes to pursue.

II. THE RECORD WOULD SUPPORT A MERITORIOUS REQUEST TO FILE AN OUT-OF-TIME APPEAL FROM THE DENIAL OF HENDERSON'S PETITIONS FOR POSTCONVICTION RELIEF; HOWEVER, HENDERSON HAS COMMUNICATED THAT HE DOES NOT WISH COUNSEL TO FILE SUCH A REQUEST.

A. A Petition for Permission to File an Out-of-Time Appeal Is Appropriate in This Case to Obtain Appellate Review of the District Court's Postconviction Relief Orders.

Ordinarily, a notice of appeal from the denial of a petition for postconviction relief must be filed with the Clerk of the Supreme Court within 60 days of the entry of the denial order. Mont. Code Ann. § 46-21-203; Mont. R. App. P. 4(5). However, Mont. R. App. P. 4(6) provides that "In the infrequent harsh case and under extraordinary circumstances amounting to a gross miscarriage of justice, the supreme court may grant an out-of-time appeal." Such a request must be "by verified petition supported by affidavits, records, and other evidence establishing the existence of the extraordinary circumstances claimed." Mont. R. App. P. 4(6). "Extraordinary circumstances do not include mere mistake, inadvertence, or excusable neglect." Mont. R. App. P. 4(6). This Court has held that "An 'out-of-time' appeal is a remedy that may be available to a defendant involved in criminal proceedings who, through no fault of his own, misses a deadline for filing an appeal." *State v. Garner*, 1999 MT 295, ¶ 10, 297 Mont. 89, 990 P.2d 175. The Court has observed, "Typically, the missed deadline is due to ineffective assistance of counsel." *Garner*, ¶ 10. An attorney's failure to file a notice of appeal when a

defendant has requested that such a notice of appeal be filed is deficient performance. *State v. Tweed*, 2002 MT 286, ¶ 18, 312 Mont. 482, 59 P.3d 1105 (*overruled in part on other grounds by State v. Deserly*, 2008 MT 242, ¶ 12, 344 Mont. 468, 188 P.3d 1057). Where it is shown that the defendant would have appealed but for his attorney's failure to file a notice of appeal, the failure is prejudicial. *Tweed*, ¶ 18.

Given the district court's denial of Neier's previous request to withdraw, Neier remained Mr. Henderson's attorney at the time the district court issued the order denying the petition and amended petition for post-conviction relief. The order itself indicates that a copy of the order was sent to Neier as counsel. Henderson desired to appeal the district court's order but asserts that he was led to believe by Neier's letter and past history that Neier would no longer be representing him. Henderson, thus, sought to file the notice of appeal himself. Working without the assistance of his attorney and while incarcerated in an out-of-state prison, Henderson managed to get an attempted notice of appeal document into the district court clerk's possession within 60 days of the district court's denial order. Although this document was procedurally deficient in several respects, it demonstrates Henderson's desire to appeal as well as showing that but for Neier's abandonment, Henderson would have properly appealed from the district court's order. Neier's failure to file a notice of appeal upon Henderson's behalf was not

Henderson's fault. Neier's failure to provide Henderson with effective assistance of counsel combined with Henderson's repeated attempts to file a notice of appeal on his own, constitutes "a gross miscarriage of justice" that warrants this Court granting Henderson an out-of-time appeal.

B. It Is Undersigned Counsel's Understanding That Henderson Does Not Wish Counsel to File a Petition for Permission to File an Out-of-Time Appeal From the District Court's Denial of Henderson's Request for Postconviction Relief.

Henderson has informed undersigned counsel that what he wishes to file is not an appeal from the district court's denial of his petitions for postconviction relief. Undersigned counsel understand the choice to appeal or not appeal to be an "objective[] of representation" under Mont. R. Prof. Cond. 1.2(a) concerning which "a lawyer shall abide by a client's decisions." *See Jones v. Barnes*, 463 U.S. 745, 751 (1983) (recognizing that "the accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or to take an appeal"). Given counsel's understanding that now Henderson does not wish to seek an out-of-time appeal from the district court postconviction relief order, counsel believes he is ethically prohibited from independently filing such a petition even though such a petition would be meritorious and is the explicit purpose for which this Court appointed counsel. Counsel would note that if Henderson's position changes and

he grants counsel permission to request an out-of-time appeal from the district court's postconviction denial order, counsel has such a petition prepared and would immediately file it with this Court.

III. THE RECORD MIGHT ARGUABLY SUPPORT CERTAIN OTHER ISSUES OR PROCEDURES.

A. Whether Henderson's Case Is Still on Direct Appeal of His Underlying Conviction Such That it Would Be Appropriate to File a New Notice Seeking Further Direct Appeal of the Underlying Conviction?

This Court concluded its opinion in Henderson's 2003 appeal by stating that "Whether [trial counsel] had a tactical or strategic reason for not calling his client to testify, given his opening statements, is best explored in an evidentiary hearing in a postconviction proceeding." *Henderson*, ¶ 18. The Court held that "Henderson's claim of ineffective assistance of counsel is not sufficiently record-based, and, accordingly, we dismiss this appeal." *Henderson*, ¶ 19. Since the Court did not say that it was "denying" the appeal or "affirming" the district court, use of the term "dismiss" could be argued to mean that the Court was dismissing the direct appeal without prejudice to be refiled following an evidentiary hearing in the district court regarding the reasons behind trial counsel's failure to call Henderson to testify. *See State v. Hendricks*, 2003 MT 223, ¶ 12, 317 Mont. 177, 75 P.3d 1268 (holding in a similar and contemporaneous appeal that "the ineffective assistance of counsel claim is dismissed without prejudice to its being

raised in a postconviction relief proceeding"). The Court did suggest the need for an evidentiary hearing regarding the ineffective assistance issue. *See Henderson*, ¶ 18.

The position that this case is still in the direct appeal--not postconviction relief--phase is arguably supported by Neier's continued service as Henderson's publically funded attorney following this Court's 2003 *Henderson* decision. Additionally, when Neier sought to withdraw from Henderson's representation, Neier arguably employed an *Anders* procedure that is traditionally used during direct appeals of right.

B. Whether the District Court Has Yet to Issue a "Final Judgment" Regarding Neier's *Anders* Motion Such That the Time for Filing a Notice to Appeal Has Not Yet Begun to Run Under Mont. R. App. P. 4?

Yet Henderson could argue that the district court has to make a specific ruling regarding Neier's *Anders* motion. Although the district court ordered that Neier would not be allowed to withdraw from the case (D.C. Doc. 18) and that Henderson's request for postconviction relief "is not well-taken and is appropriately denied" (D.C. Doc. 40 at 4), Henderson could argue that these documents were not specific rulings by the district court as to whether there are any issues with arguable merit as required under the *Anders* procedure initiated by Neier. Since the Anders motion has not been explicitly addressed it could be argued that the district court's existing orders do not "settle[] all claims in

controversy" as required for a final judgment under Mont. R. App. P. 4(1) and, thus, that the time for filing a notice of appeal in the case has yet to begin running.

IV. WHETHER THIS COURT MUST DETERMINE WHETHER UNDERSIGNED COUNSEL HAS AN ACTUAL CONFLICT OF INTEREST AND INTENSION TO PROTECT FELLOW PUBLIC DEFENDER NEIER WARRANTING REMOVAL OF UNDERSIGNED COUNSEL?

Henderson has previously expressed concerns that counsel, an employee of the Office of the Public Defender, is acting to protect Neier who is also presently employed as a public defender. A motion to remove undersigned counsel on the basis that counsel has a conflict of interest regarding raising an ineffective assistance of counsel claim relating to another OPD attorney or that counsel is actually presently acting to protect Neier would have to be considered non-frivolous as this Court recently heard oral argument on a similar petition in *State v. Sellers*, DA 09-0556 and -0605 and has yet to issue a decision. However, Henderson has not exercised his procedural prerogative under Mont. R. App. P. 10(1)(c) to file such a petition to disqualify and remove counsel. The issue, thus, does not appear to be before this Court in this case at this time. Were Henderson to file such a petition and seek removal of undersigned counsel, counsel would of course respond or proceed as directed by this Court.

CONCLUSION

Undersigned counsel has not identified any non-frivolous appeal issues that Henderson wishes to pursue and requests this Court to allow counsel's withdrawal.

Respectfully submitted this ____ day of July, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing *Anders* Brief to be mailed to:

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27 of the Montana Rules of Appellate Procedure, I certify that this *Anders* brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is not more than 10,000 words, not averaging more than 280 words per page, excluding certificate of service and certificate of compliance.

_____

KOAN MERCER

APPENDIX